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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**
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8 MARCELL WILLIAMS,

9 *Plaintiff,*

10 vs.

11 COLLINS, *et al.*

12 *Defendants.*
13

3:13-cv-00589-RCJ-VPC

ORDER

14 This *pro se* prisoner civil rights suit comes before the Court for initial review of the
15 complaint. The initial partial filing fee has been paid.

16 When a “prisoner seeks redress from a governmental entity or officer or employee of
17 a governmental entity,” the court must “identify cognizable claims or dismiss the complaint,
18 or any portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to state a
19 claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who
20 is immune from such relief.” 28 U.S.C. § 1915A(b).

21 In considering whether the plaintiff has stated a claim upon which relief can be granted,
22 all material factual allegations are accepted as true for purposes of initial review and are to
23 be construed in the light most favorable to the plaintiff. *See, e.g., Russell v. Landrieu*, 621
24 F.2d 1037, 1039 (9th Cir. 1980). However, mere legal conclusions unsupported by any actual
25 allegations of fact are not assumed to be true in reviewing the complaint. *Ashcroft v. Iqbal*,
26 556 U.S. 662 (2009). That is, bare and conclusory assertions that constitute merely formulaic
27 recitations of the elements of a cause of action and that are devoid of further factual
28 enhancement are not accepted as true and do not state a claim for relief. *Id.*

1 Further, the factual allegations must state a plausible claim for relief, meaning that the
 2 well-pleaded facts must permit the court to infer more than the mere possibility of misconduct:

3 [A] complaint must contain sufficient factual matter,
 4 accepted as true, to “state a claim to relief that is plausible on its
 5 face.” [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127
 6 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007).] A claim has facial
 7 plausibility when the plaintiff pleads factual content that allows the
 8 court to draw the reasonable inference that the defendant is liable
 9 for the misconduct alleged. *Id.*, at 556, 127 S.Ct. 1955. The
 10 plausibility standard is not akin to a “probability requirement,” but
 11 it asks for more than a sheer possibility that a defendant has
 12 acted unlawfully. *Ibid.* Where a complaint pleads facts that are
 13 “merely consistent with” a defendant’s liability, it “stops short of
 14 the line between possibility and plausibility of ‘entitlement to
 15 relief.’ ” *Id.*, at 557, 127 S.Ct. 1955 (brackets omitted).

16 [W]here the well-pleaded facts do not permit the court
 17 to infer more than the mere possibility of misconduct, the
 18 complaint has alleged - but it has not “show[n]” - “that the pleader
 19 is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

20 *Iqbal*, 556 U.S. at 678.

21 Allegations of a *pro se* complainant are held to less stringent standards than formal
 22 pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519 (1972).

23 Plaintiff Marcell Williams seeks damages and injunctive relief from Washoe County
 24 Deputies Collins, Lightner, and Conrad, in their individual and official capacities.

25 Count I states a claim for relief for alleged excessive use of force against plaintiff,
 26 whether under the Fourteenth Amendment (for a pretrial detainee) or the Eighth Amendment
 27 (for a convicted inmate) instead invoked by plaintiff.

28 Count II does not state a claim for relief as alleged. Plaintiff alleges that he was held
 in administrative segregation at the jail for 35 days allegedly in violation of his right to
 procedural due process under the Fourteenth Amendment. The complaint does not specify
 whether plaintiff was held as a pretrial detainee or instead as a convicted inmate. Merely
 because he was held in the local jail does not necessarily signify that he was one rather than
 the other. The distinction makes a difference in this context. For a convicted inmate, being
 held in administrative segregation for 35 days would not give rise to the deprivation of a
 protected liberty interest as a threshold requirement for a due process claim. See *Sandin v.*

1 *Conner*, 515 U.S. 472, 485-86 (1995). Moreover, Count II does not contain any allegations
 2 of actual fact establishing that any of the named defendants, rather than unnamed others,
 3 committed alleged violations that caused him to remain in administrative segregation. Given
 4 that the allegations do not permit the reviewing court to infer more than the mere possibility
 5 of misconduct, Count II fails to state a claim upon which relief may be granted.

6 The complaint further does not state a claim for relief based upon plaintiff having been
 7 subjected to alleged verbal assault.¹ *E.g.*, *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir.
 8 1987)(verbal harassment or abuse is not sufficient to state a constitutional deprivation under
 9 42 U.S.C. § 1983).

10 The complaint also does not state a claim against any of the defendants in their official
 11 capacity. Plaintiff may not pursue an official capacity claim against a local government officer
 12 absent factual allegations tending to establish that the constitutional violations occurred
 13 pursuant to an official policy, custom or practice of the municipality. *See, e.g.*, *Butler v. Elle*,
 14 281 F.3d 1014, 1026 n.9 (9th Cir. 2002); *Arpin v. Santa Clara Valley Transportation Agency*,
 15 261 F.3d 912, 925 (9th Cir. 2001). The complaint does not contain any such allegations. The
 16 complaint thus fails to state a claim against the defendants in their official capacity.

17 The Court will dismiss the deficient claims and provide plaintiff an opportunity to file an
 18 amended complaint correcting these deficiencies, to the extent possible.

19 IT THEREFORE IS ORDERED that the Clerk of Court shall file the complaint and that
 20 the following claims are DISMISSED without prejudice for failure to state a claim upon which
 21 relief may be granted: (a) Count II in its entirety; (b) all claims for verbal assault; and (c) all
 22 claims against all defendants in their official capacity only.

23 IT FURTHER IS ORDERED that plaintiff shall have **thirty (30) days** within which to
 24 mail an amended complaint to the Clerk for filing correcting the deficiencies in the original
 25 complaint, if possible. If plaintiff does not timely mail an amended complaint correcting the
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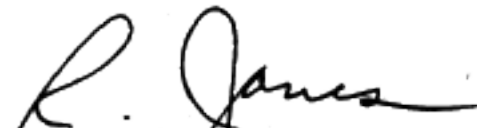
27 ¹ Plaintiff in any event must present all of his operative factual allegations within the body of the counts
 28 of the complaint. He may not allege additional claims in the "Nature of the Case" portion of the complaint
 form, which is intended only to provide an overview of the claims.

1 deficiencies in the original complaint, the action will proceed forward only on the remaining
2 claims against the defendants only in their individual capacities.

3 IT FURTHER IS ORDERED that plaintiff shall clearly title any amended complaint filed
4 as an amended complaint by placing the word "AMENDED" immediately above "Civil Rights
5 Complaint" on page 1 in the caption and shall place the docket number,
6 **3:13-cv-00589-RCJ-VPC**, above the word "AMENDED" in the space for "Case No." Under
7 Local Rule LR 15-1, any amended complaint filed must be complete in itself without reference
8 to prior filings. Thus, any allegations, parties, or requests for relief from prior papers that are
9 not carried forward in the amended complaint no longer will be before the Court.

10 The Clerk shall SEND plaintiff with two copies of a blank § 1983 complaint form and
11 one copy of the instructions for same, along with a copy of the original complaint that he
12 submitted.

13 DATED: April 28, 2014

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17 ROBERT C. JONES
18 United States District Judge
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